IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1170 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ASHOKBHAI OMPRAKASH

Versus

STATE OF GUJARAT

Appearance:

MR G RAMAKRISHNAN for Petitioner

Mr.S.P. Dave, APP for Respondent.

CORAM : MR.JUSTICE A.K.TRIVEDI

Date of decision: 08/02/2001

ORAL JUDGEMENT

Heard learned Advocate Mr. G. Ramkrishnan for the appellant and learned A.P.P. Mr. S.P. Dave for the respondent-State.

1. The appellant-Ashokbhai Omprakashbhai Valand is the original accused of Sessions Case no.51/1993 registered in the Sessions Court at Nadiad. The appellant has filed the present appeal to challenge the judgment and order of conviction and sentence dated 1-9-1997 rendered by the learned Addl. Sessions Judge, Nadiad in Sessions Case no.51/1993.

2. That vide impugned judgment and order of conviction and sentence, the appellant is convicted for the offence made punishable under Sec.354 of the Indian Penal Code ("IPC" for short)and is ordered to undergo sentence of R.I. for one year and to pay fine of Rs.2000/-,in default, to undergo S.I. for two months. The appellant is also convicted for the offence made punishable under Sec.376 of the IPC and is ordered to undergo R.I. for five years and to pay fine of Rs.10,000, in default, to undergo R.I. for two years. However, the appellant is acquitted of the offence charged against him under Sec.366, IPC.

3. The prosecution case, in nutshell, could be stated as under:

On 8th January, 1992 a complaint came to be registered at Sojitra Police Station against the present appellant (hereinafter referred to accused) by the prosecutrix. It is alleged in the complaint that on the said day in the noon hours, the prosecutrix in the company of her neighbour Reshma had gone to attend the call of nature in the nearby farm and when they were returning, the accused met them. The accused gave money to Reshma and asked her to stand there and took the prosecutrix a little away. On resistance by the prosecutrix the accused lifted the prosecutrix and took her into the farm and committed sexual intercourse against the will and without the consent of the prosecutrix. Thereafter, the accused went away. That the prosecutrix narrated the story to her mother who met her on the way. Thereby, complaint was lodged. That the complaint was registered as I CR no.4/92, and was investigated and a chargesheet was filed against the accused. Thereafter, the case was committed to the Sessions Court, Nadiad.

4. That the learned Sessions Judge framed the charge on 15-7-1997 for the offences made punishable under Sec.354, 366 and 376 of the Indian Penal Code. The accused denied the charge and claimed to be tried, and as such, was put to the trial.

The prosecution examined three witnesses - (i) PW 1 Tanujaben Bachubhai -the prosecutrix vide Exh.4; PW 2 Bai Shakina-the mother of the prosecutrix Exh.8 and PW 3 M. K. Chaudhary the I.O. vide Exh.18.

The prosecution has also produced documentary evidence. Exh.9 is the Panchnama of the scene of offence; exh.11 is the Panchnama of the person of the accused; exh.12 is the medico legal certificate of examination of prosecutrix regarding injury and her age; exh.13 is the medico legal certificate of the accused; Exh.14 is the birth certificate of the prosecutrix; exh.15 is the Ravangi Nondh; exh .16 is the report of FSL and exh.17 is the report of serological analysis.

That in consideration of material produced, the learned Addl. Sessions Judge, Nadiad, convicted and imposed sentence on the accused as stated hereinabove, and hence, this appeal is filed by the accused from jail.

5. The learned Advocate Mr. G. Ramkrishnan assigned by way of legal aid to the appellant has taken me through the evidence of PW 1 and PW 2 to urge that though the prosecutrix and her mother have not supported the case of the prosecution, the learned Addl. Sessions Judge without recording the finding of facts and assigning extraneous reasons has passed the impugned order. That the approach of the learned Additional Sessions Judge being perverse, the order of conviction and sentence could not be sustained.

6. It would be pertinent to note that in paragraph 20 of the judgment, the learned Addl. Sessions Judge has noted that the prosecutrix is declared hostile and has not supported the case of the prosecution, but from the circumstances apparent from the evidence, it cannot be said that the accused is not at fault. That the witnesses of prosecution are won over, but the said fact cannot be of any assistance to the accused and on that circumstance held the accused guilty for the offences made punishable under Sec.354 as well as Sec.376.

That on scrutiny of evidence, it appears that during the examination-in-chief, the prosecutrix has narrated the incident as stated in FIR, however, on the next day when further evidence was to be recorded, the prosecutrix has refused to identify the clothes of muddammal, and as such , prosecutrix was declared hostile. That during the cross-examination, the prosecutrix has denied the story as stated in examination-in-chief and has stated that she had given

complaint against the accused at the instance of neighbours who instigated her to give the false complaint. Thus, prima facie, the evidence of prosecutrix does not establish the facts charged against the accused. Not only that, but the mother of the prosecutrix PW 2 who has deposed vide Exh.8 has not supported the case and has stated that no such incident has taken place. She has refused to have given a police statement put to her during her cross-examination.

Apart from the oral evidence, it would be significant to note that the medical evidence also is of no assistance to the prosecution. Exh.12 the medical certificate discloses the fact that though the prosecutrix was examined on the very day at 11.00 p.m., no external injury was found on the body of the prosecutrix. Not only that, no injuries were found on the private part of the prosecutrix. The Doctor who had certified has observed that no positive finding could be given that she had a sexual intercourse in the recent past. It is also stated therein that the prosecutrix was habituated to sexual intercourse. In view of the above stated evidence, it can be said to be a case of no evidence against the accused, however, the learned Addl. Sessions Judge without recording a finding of facts has assigned the reasons to hold the appellant guilty for the offence made punishable under Secs.354 and 376 of IPC which being contrary to the evidence on record cannot be sustained. The observations made by the learned Addl. Sessions Judge in the judgment are extraneous to the fact in issue, and as such, it is necessary for this Court to interfere and set aside the order of conviction and sentence.

7. On the basis of the foregoing discussion, appeal is allowed. The impugned judgment and order dated 1st September, 1997 rendered by the learned Addl. Sessions Judge, Nadiad in Sessions Case no.51/93 is hereby quashed and set aside. The accused-appellant-Ashokbhai Omprakash Valand is ordered to be set at liberty forthwith, if not required in any other case. Fine, if paid, by the accused shall be refunded to the accused after due verification.

(A.K.Trivedi,J.)

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